IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID COHAN and SUSAN SCHARDT, on behalf of themselves and all other similarly situated persons, known and unknown, Plaintiffs, v. MEDLINE INDUSTRIES, INC., and MEDCAL SALES LLC, Defendants.	Case No. 14-CV-1835 **Judge John Robert Blakey** Magistrate Judge Jeffrey Cole

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Plaintiffs David Cohan ("Cohan") and Susan Schardt ("Schardt") (together "Plaintiffs") worked as commissioned Salespersons for Medline Industries, Inc. and MedCal Sales, LLC, respectively (together "Medline" or "Defendants").[1] Under its commission plans, Medline paid commissions on year over year sales growth throughout the Salesperson's territory. To calculate the territory's growth, Medline factored in both the increases in sales ("positive growth") *and* the decline in sales ("negative growth") to arrive at a net increase or decrease in sales, and then paid commissions based only on an overall positive growth number.

Plaintiffs claim that factoring negative growth into the commission calculations was an unlawful deduction from their commissions. Because their employment agreements contain an Illinois choice-of-law provision, Plaintiffs bring a claim under Illinois Wage Payment and Collection Act, 820 ILCS 115/1, *et seq.* ("IWPCA"), on behalf of themselves and all of Medline's Salespersons nationwide who were paid on growth-based commissions. Plaintiffs make this claim under Illinois law per their employment agreements, though neither of them actually brought a breach of contract claim concerning their employment agreements, and neither of them performed any commissioned sales work in the state of Illinois.

Plaintiffs also claim these alleged deductions from commissions violate the wage laws of New York and California, the states where they reside. The laws of Illinois, New York, and California all require that an employer pay wages consistent with its contract or agreement. Both Plaintiffs admit having a long-time understanding of Medline's method for including negative growth in its commission calculations, and that Medline was not going to "zero out" the

[1] With respect to the issues presented in Defendants' Motion for Summary Judgment, there are no material distinctions between Medline Industries, Inc. and MedCal Sales, LLC. Defendants therefore use the term "Medline" to refer to either/both entities.

negatives and pay commission on positive growth only. Even with this understanding, Plaintiffs continued to work for Medline under these commissions plans. Based on the undisputed facts, all of Plaintiffs' claims fail as a matter of law. Accordingly, the Court should grant Medline's motion for summary judgment on Plaintiffs' individual claims.

II. STATEMENT OF MATERIAL FACTS[2]

A. Medline's Advanced Wound Care Division

Medline is a manufacturer of healthcare supplies headquartered in Mundelein, Illinois, with sales and distribution operations throughout the United States. (DSF ¶ 1). Salespersons in Medline's Advanced Wound Care ("AWC") division are each assigned a geographic territory, and are responsible for selling AWC products to new or existing accounts within their assigned territory. (DSF ¶ 6). As AWC Salespersons, Plaintiffs were subject to a pay plan whereby their commissions were based on sales growth year over year for their assigned territories. (DSF ¶ 7).

B. Medline's Calculation of Commissions

To calculate year over year sales growth during the relevant time period from 2004-2014,[3] Medline started with the AWC Salesperson's invoiced sales for the current month and subtracted the invoiced sales from the same month in the previous year. (DSF ¶ 8). Depending on whether the AWC Salesperson sold more in the current month than in the same month last year, this calculation could result in a positive sales growth number (indicating a growth in sales) or a negative sales growth number (indicating a decline in sales). (DSF ¶ 8).

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[2] Defendants' Local Rule 56.1 Statement of Undisputed Material Facts in Support of Their Motion for Summary Judgment is incorporated herein by reference and cited as "(DSF ¶ ___)." All supporting exhibits are contained in Defendants' Appendix of Exhibits in Support of Their Motion for Summary Judgment.

[3] Count I of the Third Amended Class Action Complaint alleges violations of the IWPCA, which has a ten-year statute of limitations. *See* 735 ILCS 5/13-206. Both Plaintiffs filed their claims against Medline in 2014, the last year for which either of them earned commissions from Medline. The statutes of limitations for wage claims brought under New York and California law are shorter. *See* N.Y. Lab. Law § 198(3) (six years); *Pineda v. Bank of America, N.A.*, 50 Cal. 4th 1389 (2010) (three years) (citing Cal. Code Civ. Pro. § 338(a)).

To calculate commissions based on sales growth, Medline multiplied the AWC Salesperson's sales growth by a commission percentage. (DSF ¶¶ 9-10). In some years during the relevant time period, commissions were calculated by multiplying the AWC Salesperson's sales growth figure for each product category or "bucket" by a specific commission percentage assigned to that category. (DSF ¶ 9). In other years, the commission percentage was applied to the AWC Salesperson's overall territory sales growth. (DSF ¶ 10). Whether the sales growth component was calculated by product category or by overall territory, the commission calculation always included the AWC Salesperson's entire book of business – e.g., combining accounts with positive sales growth and accounts with negative sales growth.[4] (DSF ¶ 11). Additionally, from 2004-2012, the commission calculation also included a "carryover" component, such that an AWC Salesperson with a negative overall territory sales growth in one month was required to cover this loss with positive sales growth in subsequent months before he or she could earn any commissions based on sales growth. (DSF ¶ 12). This is consistent with

[4] The end result is the same whether Medline calculated sales growth for the entire territory and *then* applied the commission percentage (Example #1), or if Medline applied the commission percentage to each account's sales growth *before* combining commissions for all accounts in the territory (Example #2). In the examples $5 and $7 represent positive growth, -$2 represents negative growth, and 8% is the commission rate:

Example #1
($5 - $2 + $7) x 8% = $0.80

Example #2
($5 x 8%) + (-$2 x 8%) + ($7 x 8%) = $0.80

It is only Example #2, however, that reflects the concept of "positive commissions" and "negative commissions" being totaled each month. As explained in Section II.C, below, Medline's Wound Care Commission Summary and Growth Report and Medline's Commission Summary by Item Detail Report analyzed and reported commissions in the manner of Example #2 – showing positive and negative commissions for specific product categories and for specific accounts within each Salesperson's territory.

the year over year commission structure. (DSF ¶ 12). In 2013 and 2014, if an AWC Salesperson had negative overall territory sales growth for the month, it was zeroed out and was no longer carried over into subsequent months. (DSF ¶ 13).

C. Medline's Monthly Reporting

The applicable commission percentages were published each year in the annual AWC pay plan, which was typically explained to AWC Salespersons in December or January at the AWC kick-off "promo meeting." (DSF ¶ 14). In addition to the explanations provided at yearly promo meetings, AWC Salespersons received at least two reports specifically detailing their sales growth and their commissions based on sales growth each month: (1) the "Wound Care Commission Summary and Growth Report" and (2) the "Commission Summary by Item Detail Report" (also referred to as the "Commission Growth Summary Detail Report" or the "Detailed Commission Report"). (DSF ¶ 15). AWC Salespersons had access to these reports each month through Medline's intranet, called "Medline 360." (DSF ¶ 15).

The Wound Care Commission Summary and Growth Report showed each AWC Salesperson's sales for the month as compared to the same month in the prior year, broken down by product groupings for the Salesperson's entire territory. (DSF ¶ 16). The Wound Care Commission Summary and Growth Report also included a chart titled "Commission Calculation," which reported commissions for each product category (whether positive or negative) based on that month's sales growth. (DSF ¶ 17). The line labeled "Total Commission" then showed the sum of all commissions for the month, adding the positives and negatives together across all product categories. (DSF ¶ 18).

The Commission Summary by Item Detail Report showed sales growth in additional detail, including sales growth by account and by product. (DSF ¶¶ 19-20). The Commission Summary by Item Detail Report also included a column labeled "Commissions $" which listed a positive or negative dollar figure for each account and product. (DSF ¶ 19). In this manner, the Commission Summary by Item Detail Report correlated the Salesperson's negative sales growth to the Salesperson's commissions by account and item, providing the Salesperson with a monthly blueprint of how the negative growth generated negative reported commissions by measuring sales growth at a granular level. (DSF ¶ 20). Cohan and Schardt both admit they received these types of monthly reports on an ongoing basis from Medline since at least 2009. (DSF ¶ 21).

D. Cohan's Employment with Medline

Cohan worked as a Salesperson in Medline's AWC division for approximately five and a half years, from December 2007 through July 2013. (DSF ¶ 22). Prior to serving in the AWC sales force, Cohan worked from 1992 to 2007 as a Salesperson in Medline's General Line division. (DSF ¶ 23). Cohan resigned from his employment with Medline in July 2013. (DSF ¶ 22).

1. Cohan's Employment Agreements

Cohan's employment as an AWC Salesperson in the General Line division was governed by a March 25, 1999 "Employment Agreement." (DSF ¶ 24). As a General Line Salesperson, Cohan was paid a variable commission on every sale, based on profitability, with a bonus based on growth. (DSF ¶ 25). As an AWC Salesperson, by contrast, Cohan's commissions were based on growth. (DSF ¶ 25).

Pursuant to the terms of a supplemental agreement, the November 26, 2007 "Agreement Regarding Continued Employment," which specifically governed Cohan's transition from the General Line sales force to the AWC sales force, Cohan's employment in the AWC division included the following terms, among others:

- Base salary of $60,000 in 2008.
- ***Commission plan based on sales growth year over year for assigned territory.***
- Guaranteed draw of $5,000 minimum per month against commissions for the first

18 months.

- Participation in the AWC "spiff" program and annual performance bonus program.
- Car allowance $600/month (paid via paycheck, $300/pay period).
- Reimbursement of normal and customary business expenses per the AWC guidelines.
- 401K [sic], vacation time, health insurance and other benefits remain unchanged.

(DSF ¶ 26) (emphasis added).

Cohan's 1999 Employment Agreement explicitly states that Medline has the right to compensate Cohan "on the basis of a commission program" and can "periodically vary the . . . rate of commission" after instituting a commission payment plan. (DSF ¶ 27). Cohan admits Medline had the right to change the terms of its commission payment plan, and he has not alleged a breach of contract claim against Medline as part of this lawsuit. (DSF ¶ 28).

2. Cohan's Understanding of the Commission Plans

Cohan admits that at the time of his transition to the AWC sales force, he discussed the fact that his commissions would be based on sales growth year over year for his assigned territory with his new boss, Arthur Singer ("Singer"), and with Medline's then Vice President of Advanced Wound Care Sales, Doug Brown ("Brown"). (DSF ¶ 29).

As early as January 2008, Cohan admittedly received and reviewed the Commission Summary and Growth Report, which confirmed that Medline was including negative sales growth in its calculation of Cohan's commissions. (DSF ¶¶ 30-31). In particular, the negative figures in the February 2008 Commission Summary and Growth Report are an example of the type of reporting that stood out to Cohan and caught his attention. (DSF ¶ 32). Since at least 2009, when he received and analyzed the Commission Summary by Item Detail Report, it became crystal clear to Cohan that lost business, or sales decline, was included as a negative number in the commission calculations. (DSF ¶ 33). According to Cohan, the detail report "exposed everything out there" and made it "very, very apparent," through a summary of plusses and minuses, "where all the negatives were coming from." (DSF ¶ 33).

Cohan's testimony leaves no doubt that he understood that negative growth in his accounts negatively impacted his overall commissions. In 2009, Cohan complained to Singer about the calculation of commissions, asking, "Where are these negatives coming from? Why?" (DSF ¶ 34). Singer allegedly responded, "That's the pay plan. If you don't like it, leave." (DSF ¶ 34). Similarly, at an AWC promo meeting in August of 2010 or 2011, Cohan again questioned Medline's inclusion of lost business in the calculation of commissions for the AWC division. (DSF ¶ 36). Christine Dorshorst ("Dorshorst"), who became Vice President of Advanced Wound Care Sales in 2011,[5] allegedly responded, "This is my biggest pet peeve. You know, you get paid – your number is your number. You get paid over [sic] year over year." (DSF ¶ 36). Indeed, according to Cohan, the consistent response from Medline management was "this is the pay plan" and "this is how we do it or go find another job." (DSF ¶ 37). At a promo meeting in August 2012, manager Michael Carroll ("Carroll") explicitly told Cohan "the negatives are never going away." (DSF ¶ 38).

Cohan also admits no one at Medline ever told him he would earn commissions without factoring in the decline in sales for his accounts, and that there is no written documentation from Medline stating that negative sales growth would be zeroed out, such that he would earn commissions on positive growth only. (DSF ¶ 39). In Cohan's own words, he and Medline had a "long-standing difference of opinion" and a "fundamental" disagreement about how his commissions *should be* calculated. (DSF ¶ 40). Nevertheless, Cohan undeniably understood that Medline factored negative growth into the calculation of his commissions, and he continued

[5] Dorshorst officially took over as Vice President of Advanced Wound Care Sales in 2011, although she started the transition from Brown in September 2010. (DSF ¶ 35).

to work for Medline as an AWC Salesperson until July 2013, under this understanding. (DSF ¶ 41).

3. Cohan's Accounts and His Travel to Illinois

Cohan's territory as an AWC Salesperson consisted of accounts located in New York, including at various times the Bronx, Westchester, Queens, Manhattan, and Long Island. (DSF ¶ 42). Cohan serviced these accounts by conducting in-service training on specific AWC products, communicating via phone and text messages, visiting on-site, and supplying information to the customers' internal decision-making committees. (DSF ¶ 43). Cohan was also expected to generate new customers within his territory, which generally required in-person contact. (DSF ¶ 44). Cohan had one account that remained in his territory after the customer relocated from New York to Illinois, but Cohan did not travel to Illinois to service that account. (DSF ¶ 45).

As an AWC Salesperson, Cohan attended one national sales meeting per year and two AWC promo meetings per year. (DSF ¶ 46). The national sales meetings lasted 3 to 4 days, and were held in Chicago – or the Chicagoland area – in alternating years, or sometimes for two years in a row. (DSF ¶ 47). The AWC promo meetings lasted 2 to 3 days, and were more often than not held in Illinois, although they were sometimes held in other states. (DSF ¶ 48). The national sales meetings and AWC promo meetings were full days, sometimes going straight through from a 6:30 a.m. breakfast to a 5:00 p.m. conclusion. (DSF ¶ 49). Cohan's travel to Illinois for the national sales meetings and AWC promo meetings prevented him from spending in-person time with the customers in his territory, although he could "put out fires" and handle customer issues that did not need him on-site. (DSF ¶ 50). On the whole, Cohan contends that his travel to Illinois prevented him from earning commissions that he would have earned by working out of New York. (DSF ¶ 51). Cohan admits there is no way to quantify the extent to which he was able (or unable) to continue his commissioned sales duties for his accounts while he was attending meetings in Illinois. (DSF ¶ 52). Other than attending these meetings (for a maximum total of ten days per year), Cohan did not travel to Illinois for any Medline business during the time he worked as an AWC Salesperson. (DSF ¶ 53).

E. Schardt's Employment with Medline

Schardt worked as a Salesperson in Medline's AWC division for approximately thirteen years, from February 2001 through July 2014. (DSF ¶ 54). In 2014, Schardt was put on a performance improvement plan because her sales numbers were not growing. (DSF ¶ 55). Schardt stopped working at Medline in July 2014, when she was involuntarily terminated or laid off. (DSF ¶ 56).

1. Schardt's Employment Agreements

Schardt's employment with Medline was governed by a February 19, 2001 "Employment Agreement" with Medline Industries, Inc. and a February 10, 2006 "Employment Agreement" with MedCal Sales, LLC. (DSF ¶ 57). Both agreements explicitly state that Medline has the right to compensate Schardt "on the basis of a commission program" and can "periodically vary the . . . rate of commission" after instituting a commission payment plan. (DSF ¶ 58). Schardt admits Medline had the right to change the terms of its commission payment plan, and that the terms of the commission payment plan are not found in her Employment Agreements. (DSF ¶ 59). Schardt has not alleged a breach of contract claim against Medline in this lawsuit. (DSF ¶ 59).

Pursuant to the terms of Schardt's offer letter, Schardt's employment in the AWC division included the following terms "effective the month of February, 2001 and until further notice":

- Base salary of $50,000 per year, paid on the 15th and the 30th of each month.
- You will be paid a car allowance of $500 per month, which will be included in your checks ($250 each pay period).

- Reimbursement of all normal and customary business expenses.
- In addition to the above, you will also participate in the mid-year growth bonus program, based on sales growth from March to June 30, 2001. (% sales increase x compensation through June 30, 2001, $5,000 max cap) You will also participate in our individual product spiff program.

(DSF ¶ 60). In May 2001, Schardt received a memo from then Vice President of Advanced Wound Care Sales, Chris Simpson ("Simpson"), explaining that a compensation plan was going to be "unveiled" during the upcoming Division Sales Meetings, and that the new plan included commissions tied to growth. (DSF ¶ 61).

2. Schardt's Understanding of the Commission Plans

Schardt understood from the May 2001 memo that her commissions would be based on growth under the new AWC compensation plan. (DSF ¶ 62). When she asked what "growth" meant, Schardt was told that to earn commissions based on growth, the sales in her territory for the present year had to be greater than sales in the prior year. (DSF ¶ 63). Schardt does not dispute that she agreed to be paid on growth comparing her prior year's sales to her current year's sales. (DSF ¶ 62).

Schardt claims that she first discovered that "negative commissions" were being "removed from her compensation" as part of Medline's commission calculation when she examined the BP Detail Report and the Commission Growth Summary Detail Report a few years after starting her employment with Medline. (DSF ¶ 64). According to Schardt, the Wound Care Commission Summary and Growth Report also reported negative numbers – "everywhere you see a negative number" – what she now alleges are unlawful deductions. (DSF ¶ 65).

In June 2003, Schardt's manager, Jeff Rubel ("Rubel"), gave her a five-page memo addressing Schardt's own frustration with her year-to-date performance and sales numbers. (DSF ¶ 66). The June 2003 memo included a specific example of "Negative Monthly growth" resulting in "Negative Commission," noting, "This is what is having a significant impact on your monthly commissions." (DSF ¶ 67). After discussing the June 2003 memo with Rubel, Schardt understood the mechanism through which Medline included negative growth in the calculation of her commissions. (DSF ¶ 68). In fact, according to Schardt, the June 2003 memo specifically illustrates the very type of "deduction" she now alleges is illegal. (DSF ¶ 67).

When Schardt approached Rubel and Dorshorst to ask "Why would they be taking money out of our checks?" their consistent response was, "We're not taking them away. The negative number, you add it all up, you subtract the negative, ***that's*** your commission. That's not coming out of your check." (DSF ¶ 69) (emphasis added). On another occasion, when a group of AWC Salespersons approached Dorshorst to discuss the impact of the negative numbers, Dorshorst allegedly responded "it is what it is" – which Schardt understood to mean "the pay plan is what the pay plan is and it's not going to change." (DSF ¶ 70). Schardt admits that no Medline manager ever told her that the negatives did not count or that they would be zeroed out. (DSF ¶ 71). Schardt also admits that there is no Medline document that she is aware of that reflects or explains the concept of zeroing out the negative growth so she would be paid only on "positive commissions" as she claims she should have been. (DSF ¶ 71). Despite the fact that Schardt and Medline did not "see eye-to-eye" on how commissions *should be* calculated, Schardt understood as early as 2003 that Medline included accounts with negative sales growth in the calculation of her commissions, and she continued to work for Medline as an AWC Salesperson for eleven more years, until July 2014, under this understanding. (DSF ¶ 72).

3. Schardt's Accounts and Her Travel to Illinois

Schardt's territory as an AWC Salesperson consisted of accounts located in northern California, parts of Nevada, and Hawaii. (DSF ¶ 73). Schardt did not service any customers located in Illinois. (DSF ¶ 73). As an AWC Salesperson, Schardt traveled to her assigned territory to call on her customers in person, and also visited with customers from her territory at out-of-state conferences. (DSF ¶ 74).

As an AWC Salesperson, Schardt attended one national sales meeting per year and 2 to 3 AWC promo meetings. (DSF ¶ 75). The national meetings typically lasted for three and a-half days, from a Wednesday through the following Saturday morning, and were located both in Illinois and in other states. (DSF ¶ 76). The AWC promo meetings were typically 1 or 2 days long, and were located in Illinois only about half of the time (e.g., 1 to 2 promo meetings per year were located in Illinois). (DSF ¶ 77). During both types of meetings, Schardt had very limited time to conduct her regular commissioned work of selling Medline products to her customers. (DSF ¶ 78). According to Schardt, travel to Illinois for meetings resulted in a sales loss (and therefore a deduction to her commissions) since she was not able to devote her time to making sales in her territory. (DSF ¶ 79). Other than attending these meetings (for a maximum total of nine-and-a-half days per year), Schardt did not travel to Illinois for any Medline business. (DSF ¶ 80).

III. ARGUMENT

A. Summary Judgment Standard

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine dispute of material fact sufficient to preclude summary judgment will be found to exist only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party" on the claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). While evidence in the record is to be construed in the favor of the non-movant, once a motion for summary judgment has been made, the non-movant may only defeat summary judgment by setting forth specific facts showing that there is a genuine factual issue for trial.

Anderson, 477 U.S. at 255. To meet this standard, the non-movant "must do more than raise some metaphysical doubt as to the material facts; [it] must come forward with specific facts showing that there is a genuine issue for trial." *Keri v. Bd. of Trs. of Purdue Univ.*, 458 F.3d 620, 628 (7th Cir. 2006) (*citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

B. Defendants Are Entitled to Summary Judgment On Plaintiffs' IWPCA Claims

1. Plaintiffs Have No Right to Relief Under the IWPCA

The purpose of the Illinois Wage Payment and Collection Act is "to protect employees *in Illinois* from being stiffed by their employers." *Glass v. Kemper Corp.*, 133 F.3d 999, 1000 (7th Cir. 1998) (emphasis in original); *see also* 820 ILCS 115/1. Accordingly, it has long been clear that employees who are not residents of Illinois and who did not "perform any work in Illinois" cannot state a right to relief under the IWPCA. *Id.* Moreover, even if an employee performs some work in Illinois, the employee cannot recover unpaid wages under the IWPCA for the portion of his or her work performed in another state. *See Chen v. Quark Biotech, Inc.*, 2004 U.S. Dist. LEXIS 11029, at *22 (N.D. Ill. June 15, 2004) (Hart, J.).

Judge Shah previously left open the question of whether Cohan's "travel[ ] to Illinois twice per year for meetings lasting three to four days each time" was "so unrelated to his commissions that his IWPCA claim should be dismissed," explicitly inviting Medline to re-raise this argument on a fully-developed record. *Cohan v. Medline Industries, Inc.*, 2014 U.S. Dist. LEXIS 119356, at *8-10, n.3 (N.D. Ill. Aug. 27, 2014) (Shah, J.). For the reasons set forth below, the undisputed facts developed in discovery conclusively show that Plaintiffs have no right to relief under the IWPCA in this case.

a. Plaintiffs Did Not Perform Work In Illinois

In the absence of guidance from the Illinois state courts on this issue, the Seventh Circuit has made clear that a non-resident employee who performs "no work" in Illinois cannot recover under the IWPCA, while a non-resident employee who performs "substantial work" in Illinois qualifies for the IWPCA's protections. *See Glass*, 133 F.3d at 1000; *Adams v. Catrambone*, 359 F.3d 858, 861, 863-64 (7th Cir. 2004). District courts applying this precedent have concluded that a non-resident plaintiff must have performed "sufficient" work in Illinois to state a right to relief under the IWPCA. *See Baxi v. Ennis Knupp & Assocs.*, 2011 U.S. Dist. LEXIS 99857, at *47 (N.D. Ill. Sept. 2, 2011) (Dow, J.) ("If the facts adduced in discovery indisputably show that Plaintiff did not perform sufficient work in Illinois to warrant coverage under the Wage Act, [defendant] may raise this argument on summary judgment."); *Spaulding v. Abbott Labs.*, 2010 U.S. Dist. LEXIS 123532, at *17 (N.D. Ill. Nov. 22, 2010) (Feinerman, J.) (same); *Vendetti v. Compass Environmental Inc.*, 2006 U.S. Dist. LEXIS 77609, at *7 (N.D. Ill. Oct. 25, 2006) (Aspen, J.), overruled on other grounds in *Vendetti v. Compass Envtl., Inc.*, 559 F.3d 731 (7th Cir. 2009) ("we are bound to interpret the Wage Act to apply only where an employee has done at least some work for an Illinois employer while physically present in the state of Illinois").

In *Chen v. Quark Biotech, Inc.*, Judge Hart addressed the relationship between the work performed in Illinois and the wages being claimed as damages. Judge Hart acknowledged the fact that the plaintiff "was in Chicago for a few weeks and performed work for defendant while in Chicago," but concluded this was not sufficient to state a claim under the IWPCA, because "[t]he unpaid wages that plaintiff seeks as damages are for work that would have been performed in Ohio." *Chen*, 2004 U.S. Dist. LEXIS 11029, at *22. *See also Overton v. Sanofi-Aventis U.S., LLC*, 2014 U.S. Dist. LEXIS 151243, at *13-15 (D.N.J. Oct. 23, 2014) (New Jersey Wage Payment Law did not apply because plaintiffs "are not residents of New Jersey and did not work in New Jersey, except for occasional visits to [defendant's] New Jersey offices for training"); *Colson v. Avnet, Inc.*, 687 F. Supp. 2d 914, 922 (D. Ariz. 2010) (Arizona Wage Act did not apply because "Plaintiff's only allegation that she ever set foot in Arizona for work purposes is her claim that she once spent five days within the first month of her employment to attend a 'training' event at Defendant's corporate headquarters.").

Likewise, in this case, Plaintiffs seek commissions they allege are due and owing for work they performed *outside of* Illinois making sales to the accounts in their territories. Each Plaintiff attested to spending no more than ten days per year in Illinois attending meetings. As Schardt admits, the full days of meetings in Illinois left her with "very limited" time to perform her commissioned sales duties, and Cohan further admits there is no way to quantify the amount of commissioned sales work he was able (or unable) to perform while attending meetings in Illinois. (SMF ¶¶ 52, 78). In fact, Plaintiffs contend that their travel to Illinois *prevented* them from earning commissions, thus further cementing the fact that there are no Illinois wages to be statutorily protected in this case. (SMF ¶¶ 51, 79). Should Plaintiffs need protection under any wage payment statutes, they can rely (and have relied) on the wage protection statutes of the states where they actually lived and worked. However, they cannot escape the fact that the IWPCA does not have "an extraterritorial reach" beyond Illinois' state borders. *Glass,* 133 F.3d at 1000.

b. The Contractual Choice-of-Law Provision Is Irrelevant

The fact that Plaintiffs' employment agreements include an Illinois choice-of-law provision is irrelevant to the question of whether Plaintiffs can state a claim under the IWPCA. *See Vendetti*, 2006 U.S. Dist. LEXIS 77609, at *7 ("Vendetti apparently mistakes a question of statutory applicability for a choice of law issue. Here, choice of law is irrelevant: Assuming *arguendo* that it is proper to apply Illinois law, the IWPCA is nonetheless inapplicable here, because we cannot interpret it to extend to employees who have not performed work while physically present within the state of Illinois."). As Judge Shah correctly noted in his August 27, 2014 ruling, "standard choice-of law and choice-of-forum contract provisions do not extend the reach of state statutes." *Cohan*, 2014 U.S. Dist. LEXIS 119356, at *10, n.3 (citing *Cromeens Holloman, Sibert, Inc. v. AB Volvo*, 349 F.3d 376, 385–86 (7th Cir. 2003) (Illinois Franchise Disclosure Act)). *See also Gravquick A/S v. Trimble Navigation Int'l Ltd.*, 323 F.3d 1219, 1222 (9th Cir. 2003) ("When a law contains geographical limitations on its application . . . courts will not apply it to parties falling outside those limitations, even if the parties stipulate that the law should apply."); *Wooley v. Bridgeview Bank Mortg. Co., LLC*, 2015 U.S. Dist. LEXIS 7663, at *7 (N.D. Ill. Jan. 23, 2015) (Kendall, J.) (holding that the Illinois Minimum Wage Law has no extraterritorial reach and, further, "[t]his territorial limitation is unaffected by the parties' choice of law provision designating Illinois law"); *Hadfield v. A.W. Chesterton Company*, 2009 Mass. Super. LEXIS 230, at *7 (Mass. Super. Ct. Sept. 15, 2009) ("contractual choice of law provisions do not defeat the presumption against extraterritorial application of state wage statutes").

Plaintiffs implicitly concede this point in their Third Amended Class Action Complaint by seeking relief under both the IWPCA *and* the wage protection statutes of Plaintiffs' residence states. This result would not be possible if the contractual choice-of-law provision operated so as to apply the IWPCA to all wages earned by Plaintiffs in any state. Finally, and importantly, Plaintiffs do not allege that Medline breached their employment agreements in any way. (SMF ¶¶ 28, 59). Thus, the fact that the employment agreements contain an Illinois choice-of-law provision is immaterial to the statutory claims at issue before the Court.

2. Medline Did Not Make Any Unlawful Deductions Under the IWPCA

Even if the IWPCA somehow applied to Plaintiffs' claims for unpaid commissions – which it does not – the undisputed facts demonstrate a lack of agreement between Medline and

Plaintiffs, which is fatal to Plaintiffs' IWPCA claims.

Among its other provisions, the IWPCA protects employee wages from an employer's unlawful deductions. 820 ILCS 115/9. Because "wages" are defined by statute as "compensation owed . . . pursuant to an employment contract or agreement," to prevail on an IWPCA claim a plaintiff must first show that he or she had a valid contract or agreement entitling him/her to the wages sought. 820 ILCS 115/2; *see also* 56 Ill. Adm. Code 300.510 ("[i]n order to be entitled to receive compensation for a commission under the Act, the commission must be earned under the terms of the agreement or contract").

Plaintiffs cannot prove an agreement or contract entitling them to the wages they seek in this litigation (e.g., commissions derived from a formula or calculation that does *not* include negative sales growth). On the contrary, the record is replete with evidence demonstrating that there was no agreement or mutual assent by Medline to pay commissions in the manner alleged by Plaintiffs. All of the monthly reports Plaintiffs received and every communication Plaintiffs had with Medline management – including Simpson, Rubel, Brown, Singer, Dorshorst, and Carroll – consistently confirmed that Medline was, in fact, including negative sales growth in the calculation of Plaintiffs' commissions. (SMF ¶¶ 29-38; 62-70). Plaintiffs admit that no manager ever told them they would be paid commissions without taking into account negative sales growth in their territory, and there are no documents suggesting an agreement to this effect. (SMF ¶¶ 39, 71). Also, when Plaintiffs proposed changing the terms of the commission plan to their preferred approach, Medline responded with an emphatic "No." (SMF ¶¶ 34, 36-38; 69-70). This evidence dooms Plaintiffs' claims under the IWPCA. *See Schneider v. Ecolab, Inc.*, 2015 U.S. Dist. LEXIS 37440, at *15 (N.D. Ill. Mar. 25, 2015) (Chang, J.) ("What Schneider overlooks is that he needs to establish 'a manifestation of mutual assent' from *both* parties about the purported terms of his employment agreement.") (emphasis in original).

Moreover, Plaintiffs openly concede that they understood Medline's approach to calculating commissions (e.g., including negative sales growth in the commissions calculation), and continued working as part of the AWC sales force – and collecting pay from Medline – for years thereafter. (SMF ¶¶ 40-41; 72). Under Illinois law, this type of evidence confirms an implied acceptance of Medline's payment terms, further demonstrating the baseless nature of Plaintiffs' IWPCA claims. *See Gallardo v. Scott Byron & Co.*, 2014 U.S. Dist. LEXIS 4634, at *52-53 (N.D. Ill. Jan. 14, 2014) (St. Eve, J.) ("The undisputed facts, however, show that no such agreement existed. Indeed, if any agreement existed, it was an agreement that SBC would *not* pay Gonzalez for pre- and post-shift work . . . .") (emphasis in original); *Geary v. Telular Corp.*, 341 Ill. App. 3d 694, 698 (1st Dist. 2003) ("When an at-will employee continues to work after a change in commission plan, he is deemed to have accepted the change."); *Schoppert v. CCTC International, Inc.*, 972 F. Supp. 444, 447 (N.D. Ill. 1997) (Castillo, J.) ("continuing to work over two and one half years while receiving commissions under the new structure must be seen in legal terms as an acceptance . . . grudging and protest-filled as that acceptance may have been").

With no agreement entitling Plaintiffs to the commissions they seek, their IWPCA claims fail as a matter of law. *See Marcus & Millichap Inv. Servs. of Chi., Inc. v. Sekulovski*, 639 F.3d 301, 312 (7th Cir. 2011) ("Sekulovski could not maintain a claim under the Wage Act because he was not owed any commissions"). For the reasons set forth above, and based on the undisputed facts in the record, Medline is entitled to summary judgment in its favor on the merits of Plaintiffs' IWPCA claims.

C. Defendants Are Entitled to Summary Judgment On Cohan's Claim Under the New York Labor Law

In Count II, Cohan claims a right to relief under the laws of his residence state: New York. (3d Am. Compl. ¶¶ 1, 65 n.5). Cohan cannot prevail on his claim under Section 193 of the New York Labor Law, however, because he agreed to work under the terms of Medline's commission plan – which indisputably included accounting for negative sales growth in the calculation of Cohan's commissions for his entire territory.

The New York Labor Law generally protects employee wages (including commissions) from an employer's unlawful deductions. N.Y. Lab. Law §§ 190(1), 193(1). On the other hand, Section 193 does *not* bar employers from structuring payment plans that include "downward adjustments" in the calculation of commissions, because employers and employees are free to fashion their own agreements regarding when commissions become "earned" wages. *See Pachter v. Bernard Hodes Grp., Inc.*, 10 N.Y.3d 609, 617-18 (N.Y. 2008). As long as the employee is aware of these adjustments, understands them, and acquiesces to them by accepting the end result, this type of "deduction" is not unlawful. *Id. See also Morangelli v. Chemed Corp.*, 922 F. Supp. 2d 278, 295-98 (E.D.N.Y. 2013) (holding employees' commissions were cash advances rather than earned wages and therefore not actionable under the New York Labor Law because "only deductions from earned wages are actionable"); *Levy v. Verizon Info. Servs.*, 498 F. Supp. 2d 586, 602 (E.D.N.Y. 2012) ("Because the incentive compensation does not vest before reconciliation, the advanced incentive compensation does not constitute 'wages' for purposes of § 193.").

Moreover, the employee's agreement to the commission plan need not be in writing. *Pachter*, 10 N.Y.3d at 618 ("The lack of a specific written contract is not determinative . . . ."). Thus, in *Pachter*, a course of dealings including written monthly statements issued by the employer and accepted by the employee provided "ample support for the conclusion that there was an implied contract under which the final computation of the commissions earned by Pachter depended on first making adjustments [for various costs and expenses]." *Id.*

Cohan has admitted that he understood negative sales growth was a factor in calculating his commissions – as brought to his attention, in part, by Medline's monthly reports – and he continued working for Medline and collecting commissions from Medline for a number of years. (SMF ¶¶ 29-41). This course of dealings clearly shows an established practice and implied agreement to a commission plan whereby negative growth was taken into account when calculating commissions, and under which commissions were not deemed to have been earned until these net adjustments were made. Under *Pachter* and its progeny, Cohan is not entitled to the allegedly improper deductions he claims in Count II, and summary judgment should be entered in favor of Medline on Cohan's claim under New York law.

D. Defendants Are Entitled to Summary Judgment On Schardt's Claim Under the California Labor Code

In Count II, Schardt claims a right to relief under the laws of her residence state: California. (3d Am. Compl. ¶¶ 1, 65 n.5). Schardt cannot prevail on this claim because there is no private cause of action under California Labor Code Section 221. Moreover, Schardt's claim under the California Labor Code fails because she agreed to work under the terms of Medline's commission plan – which indisputably included accounts with negative sales growth in the calculation of Schardt's commissions for her entire territory.

1. There Is No Private Right of Action under California Labor Code Section 221

Section 221 of the California Labor Code protects employee's wages against the threat of post-payment deductions, stating, "It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee." Cal.

Lab. Code § 221. California law further provides that a violation of Section 221 is a misdemeanor, and civil penalties can be recovered by the California Labor Commissioner; however, "there is no private right of action under section 221." *See Mouchati v. Bonnie Plants, Inc.*, 2014 U.S. Dist. LEXIS 60855, at *15, 22 (C.D. Cal. March 6, 2014). *Accord Gunawan v. Howroyd-Wright Empl. Agency*, 997 F. Supp. 2d 1058, 1068 (C.D. Cal. 2014). Accordingly, Schardt cannot proceed with her claim under California Labor Code Section 221, as pleaded in Count II, and summary judgment should be entered in favor of Medline on Schardt's claim for damages under California law.

2. Medline Did Not Make Any Unlawful Deductions Under the California Labor Code

Even if California law could apply to Schardt's claim – which it cannot – Schardt agreed to the "deductions" she now claims are unlawful, barring recovery under Section 221. Like the IWPCA and the New York Labor Law, California law protects employees' wages (including commissions) from unlawful deductions by their employers. *See* Cal Lab. Code §§ 220, 221. Again, however, "[t]he right of a salesperson or any other person to a commission depends on the terms of the contract for compensation." *Koehl v. Verio, Inc.*, 142 Cal. App. 4th 1313, 1330 (1st Dist. 2006). Where an employee agrees to a "deduction" that is *part of the calculation* of earned commissions, the deduction is lawful. *See Id.* at 1332 ("The commission plans between Appellants and Verio provided that, although commissions would be paid at booking (or, in 2002, installation), they were not in fact earned at that time [and were subject to later chargebacks]. This is what Appellants agreed. This is what Appellants understood. . . . We conclude that Verio's commission plans are enforceable."). The employee's agreement need not be in writing, but can be found to exist in implied contract where the employee received copies of the pay plan, training on the pay plan, and regular commission statements setting forth the alleged deductions, and thereafter continued his or her employment under the terms of the plan. *See Deleon v. Verizon Wireless, LLC*, 207 Cal. App. 4th 800, 813-14 (2d Dist. 2012) (applying *Koehl* and other § 221 case law to analogous claim under § 223).

As argued above, there can be no doubt that Schardt understood Medline was including negative sales growth in the calculation of commissions for her territory, and that she nevertheless continued to work as an AWC Salesperson for many more years, earning commissions pursuant to this understanding. (SMF ¶¶ 62-72). On the basis of these undisputed facts, Schardt cannot prevail on her claim under California law, and summary judgment should be granted in favor of Medline for this alternative reason, as well.

IV. CONCLUSION

For each of the foregoing reasons, Defendants are entitled to summary judgment on all individual claims brought by Plaintiffs in this litigation.

Respectfully submitted,

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Dated: June 15, 2015

CERTIFICATE OF SERVICE

I, Amy D. Rettberg, an attorney, certify that I caused to be served a copy of the foregoing **Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment**, upon the following counsel of record, via the Court's electronic filing system, ECF, on June 15, 2015.

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